

Supreme Court of the United States

OCTOBER TERM, 1969

No. 189

JAMES MINOR,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

DOCKET ENTRIES

67 Crim. 770

THE UNITED STATES

vs.

JAMES MINOR

T. 26, Secs. 4705(a) & 7237(b), U.S. Code.

**Unlawfully selling, bartering, exchanging & giving
away heroin not in pursuance of a written order
of the Secretary of the Treasury.**

(Two Counts)

STATISTICAL RECORD

J.S. 2 mailed ✓

J.S. 3 mailed ✓

Violation Comp. #48080

Title

Sec.

COSTS

Clerk

Marshal

Docket fee

DATE

PROCEEDINGS

9- 8-67 Filed Indictment.

9-11-67 A.F. Marra, assigned as atty. by Commissioner (B. Moldow) of counsel. Pleading adj'd to 9-14-67 bail fixed at \$2,500. deft. remanded in lieu of bail. McGOHEY, J.

9-14-67 Court directs entry of plea of Not Guilty. Def't remanded in lieu of \$2,500, bail previously fixed. Adj'd to 9-21-67. McGOHEY, J.

10-16-67 Filed waiver of trial by JURY marked Court's exhibit #1, signed by the defendant consented to by Counsel and Approved by WEINFELD, J.

DATE

PROCEEDINGS

- 10-16-67 TRIAL BEFORE JUDGE WEINFELD BEGUN WITHOUT A JURY. Trial concluded, The Court finds the defendant GUILTY AS CHARGED. Pre-sentence investigation ordered with the sentence adjourned to 11/9/67 at 10:00 A.M. defendant is REMANDED NO BAIL. WEINFELD, J.
- 10-25-67 Filed remand dated 9/11/67
- 11- 9-67 Filed Judgment: Deft. sentenced (atty present) to FIVE (5) YEARS on each of Cts. 1 & 2 to run concurrently with each other at a place of confinement to be designated by the Atty Gen'l. Deft. remanded. WEINFELD, J.
- 11- 9-67 Issued commitment & copies.
- 11- 9-67 Filed def't's notice of appeal in forma pauperis-Memo endorsed Leave granted to file notice of appeal without payment of statutory fee-WEINFELD, J. (copy mailed to def't. & to Warden, FDH, NYC and to U.S. Atty.)
- 11-16-67 Filed remand dated 10/16/17
- 11-21-67 JAMES MINOR—Filed Order that the defendant is granted leave to appeal in forma pauperis and that stenographic minutes of the trial be transcribed and that defense counsel be furnished a copy thereof, at the expense of the government pursuant to Title 28 U.S.C. S. 753(f). (Copies to be delv'd to Court Reporters by Legal Aid) WEINFELD, J. (Mailed notice on 11/22/67)
- 12- 1-67 Filed Commitment & entered return, Deft. Delivered to the Detention Hdqtrs NYC 11/9/67
- * * *
- 2-14-68 Filed transcript of proceedings dated 10/16 and 11/9/67.
A true extract of the docket entries.

Dated: May 6, 1968

/s/ John J. Olear, Jr.
Clerk

[SEAL]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Crim. 770

[File Endorsement (Omitted in Printing)]

UNITED STATES OF AMERICA

—v.—

JAMES MINOR, DEFENDANT

INDICTMENT—Filed September 8, 1967

The Grand Jury charges:

On or about the 9th day of January, 1967, in the
Southern District of New York,

JAMES MINOR,

the defendant, unlawfully, wilfully and knowingly did
sell, barter, exchange and give away to

Francisco H. Guzman

approximately 22.000 grams of heroin hydrochloride, a
narcotic drug, in that the said sale, barter, exchange
and giving away was not in pursuance of a written
order of the said Francisco H. Guzman on a form issued
in blank for that purpose by the Secretary of the Treas-
ury of the United States or his delegate.

(Title 26, Sections 4705(a) and 7237(b), United
States Code)

USA-33s-448 A—IND./INF. (Sale of Narcotic Drugs
Ed. 2/14/64 W/O Written order—succeeding count)

SECOND COUNT

The Grand Jury further charges:

On or about the 8th day of April, 1967, in the South-
ern District of New York,

JAMES MINOR,

the defendant, unlawfully, wilfully and knowingly did sell, barter, exchange and give away to

Francisco H. Guzman

approximately 19.500 grams of heroin hydrochloride, a narcotic drug, in that the said sale, barter, exchange and giving away was not in pursuance of a written order of the said Francisco H. Guzman on a form issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate.

(Title 26, Sections 4705(a) and 7237(b), United States Code)

/s/ Robert M. Morgenthau
United States Attorney

/s/ Samuel Schreckuj
Foreman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Crim. 770

THE UNITED STATES OF AMERICA

vs.

JAMES MINOR, DEFENDANT

INDICTMENT

Narcotics.

Violation of Title 26, United States Code,
Sections 4705(a) and 7237(b).

ROBERT M. MORGENTHAU
United States Attorney.

A TRUE BILL

Foreman.

Filed Sep. 8, 1967,
U. S. District Court, S. D. of N. Y.

SEP. 11, 1967

Anthony F. Marra, Assigned as Attorney by Commissioner Bernard Moldow, of counsel.

Pleading adjd. to 9/14/67. Bail fixed at \$2,500.
Deft. *remanded* in lieu of bail.

/s/ McGohey, J.

SEP. 14, 1967

Court directs entry of plea of not guilty. Deft. *remanded* in lieu of \$2,500 bail previously fixed. Adjd. to 9/21/67.

/s/ McGohey, J.

OCT. 16, 1967

Trial begun, (Jury waiver signed), and concluded. Court finds defendant Guilty as Charged. Pre sentence report ordered, date of sentence November 9th, 1967—10:00 a.m. *Remanded*. No bail.

/s/ Weinfeld, J.

Paul Geelvani

NOV. 9, 1967

Defendant sentenced, Attorney present, to five (5) years on each of Counts 1 and 2 to run concurrently with each other, at a place of confinement to be designated by the Attorney General of the United States. *Remanded*.

/s/ Weinfeld, J.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Cr. 770

UNITED STATES OF AMERICA

v.

JAMES MINOR, DEFENDANT

TRANSCRIPT OF PROCEEDINGS OF NEW YORK,
October 16, 1967, 2:15 P.M.

Before: HON. EDWARD WEINFELD, District Judge.

APPEARANCES:

ROBERT S. MORGENTHAU, United States Attorney, For
the Government, DAVID A. LUTTINGER, Assistant U.S.
Attorney.

EDWARD S. PANZER, Esq., Attorney for Defendant.

* * *

[fol. 10] FRANCISCO GUZMAN, called as a witness,
having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LUTTINGER:

Q Mr. Guzman, by whom are you presently employed?

A By the Federal Bureau of Drug Abuse Control. .

Q In which department of the government is that?

A Food and Drug Administration under Health, Edu-
cation and Welfare.

Q How long have you been so employed?

A Approximately six months.

Q Prior to working for the Bureau of Drug Abuse
Control, for whom did you work?

A As an agent for the Federal Bureau of Narcotics in
New York City.

Q How long were you so employed as an agent for the Bureau of Narcotics?

A One year.

Q Prior to that, did you have any experience in law enforcement?

[fol. 11] A Yes, sir, I spent nine and a half years in the Air Force, the last two and a half as a special agent for the Office of Special Investigations, Inspector General's Office, Department of the Air Force.

Q Agent Guzman, during the course of your tenure with the Bureau of Narcotics did you have occasion to meet a person by the name of James Minor?

A Yes, sir, I did.

Q Do you see that person in the courtroom today?

A Yes, I do.

Q Will you point him out to the Court, please?

A The gentleman sitting right here at the table with his hand to his face.

Agent Guzman, will you tell the Court when for the first time you ever saw this person before?

A On January 9, 1967, in the evening.

Q Where did you see him?

A On 117th Street between Park Avenue and Madison Avenue.

Q Was there anyone else present at the time you met him?

A Yes, there was.

Q Who was that?

A An informant of the Bureau of Narcotics.

[fol. 12] Q Will you tell the Court upon meeting Mr. Minor what happened?

A I was introduced to Mr. Minor by the informant as Frank Santiago from New Jersey, and I was in New York to buy some heroin. I shook hands with Mr. Minor, and I told him that I wanted a half piece of heroin, that would be approximately a half ounce, and I asked him if he could get it for me. He said he could. I asked him the price, and he said it would \$325. I then asked him if I would have any trouble getting rid of it, if it was good stuff, and he said there shouldn't be any trouble at all, it was good stuff. I asked him if he had it, and he said

yes, and he handed me a brown paper bag which I opened up. It contained a quantity of white powder, and I handed Mr. Minor \$325 official government funds.

Q What did you do after this?

A I left with the informant, and we went to a pre-arranged location where we were later met by the surveillance team.

Q What time did you meet the surveillance agent?

A I don't remember the exact time. It was later in the evening about an hour afterwards.

Q Who were the other agents?

[fol. 13] A Agent Wilkocki, O'Grady and Raugh.

Q What did you do with the brown paper bag that you purchased from Mr. Minor?

A I initialed it and turned it over to Agent Wilkocki.

Q When?

A That same evening, sir, when we met.

Q Did you have occasion to meet Mr. Minor again?

A Yes, I did.

Q When was the next time?

A It was on the evening of January 24, 1967.

Q Was anyone else present when you met?

A The informant was.

Q Where did this meeting take place?

A On the corner of 117th Street and Park Avenue.

Q Will you tell the Court what happened on this occasion?

A I told Mr. Minor that I wanted to purchase five bundles of heroin, and he told me that he could do the business with me of the five bundles but that his wife was ill, I believe she was pregnant at the time, and he had relatives up the house and couldn't get to his stash, so we made arrangements to meet the following day at 3 P.M.

[fol. 14] Q Was there any conversation concerning the first purchase?

A Yes. I told Mr. Minor I wasn't too happy with the quality of the heroin, that it was a low grade, and he said this stuff that he had now as better, and he would make it up to me.

Q Did you return on the following day?

A Yes, sir, I did, but Mr. Minor wasn't there.

Q Did there ever come an occasion when you saw him again?

A Yes, I did, on April 8th, I believe it was, in the afternoon with the same informant again.

Q Where did you meet?

A In front of 57 East 117th Street.

Q How did you get to that location?

A In my personal automobile.

Q What happened when you arrived at that location?

A I sent the informant up to get Mr. Minor, and they both returned a few minutes later. Mr. Minor sat in the front seat of my vehicle, and I told him I wanted five bundles of heroin. Mr. Minor told me that he had the five bundles but it would cost me \$90 a bundle, and we had an argument over the price. I told Mr. Minor [fol. 15] that the going street price was 80 to 85 a bundle and he told me he knew that but that these were fat bags and better than average stuff, so under the circumstances I took the five bundles.

Q What did you do?

A I handed Mr. Minor \$450 official government funds. He handed me a brown paper bag containing five bundles of glassine envelopes, each containing a white powder, and he then departed by vehicle and the informant and I then drove to a prearranged location and met with surveilling agents.

Q What did you do with the bag and the contents?

A I initialed them and gave them to Agent Wilkocki.

MR. LUTTINGER: Will you mark these for identification?

(Government Exhibits 1 and 2 were marked for identification.)

MR. LUTTINGER: Your Honor, Government's Exhibit 1 for identification is a locksealed envelope which is in an opened condition. Exhibit No. 2 for identification is a locksealed envelope which is in a locked and a sealed condition. I am opening Exhibit No. 2 for identification, and from within Government's Exhibit 2 I am removing

[fol. 16] what I would ask be marked Government Exhibit 3 for identification.

(Government Exhibit 3 marked for identification.)

MR. LUTTINGER: Will you mark these Government Exhibits 4 and 5 for identification?

(Government Exhibits 4 and 5 marked for identification.)

Q Agent Guzman, I show you Government's Exhibit 3 for identification and ask you if you know what that is.

A Yes, sir. This is the brown paper bag that I received the white powder from Mr. Minor on the 9th of January. I have my initials, and it is dated, and I have—I put 66 rather than 67 on the date, and initialed over that where I made the correction.

THE COURT: What is the day on which you received that?

THE WITNESS: Sir? That was on January 9, 1967. But it was the beginning of the year, and I put 1966, and then I corrected it.

MR. LUTTINGER: Your Honor, Government Exhibit 4 for identification, like Government's Exhibit 1, is a lock-sealed envelope in an opened condition. Government's Exhibit 5 for identification is a locksealed envelope which [fol. 17] is locked and sealed. Opening Exhibit 5 for identification I am removing from that its contents and ask that they be marked Government Exhibits 6 and 6-A for identification.

(Government Exhibits 6 and 6-A marked for identification.)

Q Agent Guzman, I show you 6-A for identification and ask you if you can tell the Court what that is.

A This is the brown paper bag I received the five bundles of white powder from Mr. Minor. Each one of the bundles would have my initials and the date, and the brown paper bag also has my initials and the date.

Q Was there anything inside of 6-A when you just received it now?

A Yes, there is five bundles of glassine envelopes wrapped with an orange rubberband, each one containing my initials and the date.

Q I show you Government's Exhibit 6 for identification. Will you look at that and see whether or not you can identify?

A Yes, sir. This is the substitute container when each one of the bags that you are holding was opened and the contents were poured into one large bag, which I initialed.

[fol. 18] MR. LUTTINGER: Your Honor, I have no further questions of this witness.

THE COURT: Will you please turn over all 3500 material, including the grand jury minutes?

(Government Exhibits 3500, 3501, marked for identification.)

MR. LUTTINGER: Your Honor, I am turning over copies of Exhibits 3500 and 3501 to Mr. Panzer. I will say to the Court that this witness did not testify before the grand jury, at least to my knowledge.

MR. PANZER: I would request if the government has any evidence that would be favorable or material to the defendant's defense that they turn that over to me, also.

MR. LUTTINGER: I know of no other documents or evidence that the government has in its possession to which the defense is entitled under any case or any statute.

MR. PANZER: May I have a few moments to look at this, your Honor?

THE COURT: Yes.

CROSS-EXAMINATION

BY MR. PANZER:

Q That is Agent Guzman, is that correct?

A Yes, sir.

[fol. 19] Q Agent Guzman, you were introduced to Mr. Minor through an informer, is that correct?

A Yes, sir.

Q This informer, he had been working for the Federal Bureau of Narcotics, is that correct?

A Yes, sir.

Q Was this informer some time during his life addicted to drugs?

MR. LUTTINGER: Your Honor, I object, unless the witness can state whether he knows of his own knowledge.

A I don't know, sir.

Q Do you know if he had any convictions for possession of narcotics?

A Are you speaking of at the time ~~worked~~ with him or now?

Q Any time.

A Yes, sir.

Q On this first occasion which took place on January 9, 1967, that happened in the vicinity of 116th Street, right?

A What happened in the vicinity of 116th Street?

Q The alleged transaction that you said took place on January 9, 1967.

[fol. 20] A No, sir, it did not.

Q Where did it take place?

A On 117th Street.

Q Could you tell me what time that was?

A It was at approximately 8:45 P.M., sir.

Q At the time of the transaction who was present?

A The informant, Mr. Minor, and myself.

Q Did the informant and Mr. Minor approach you, or did you approach them?

A I don't understand the question, sir.

Q Well, you got there before 8:45 P.M., in that vicinity?

A Yes, sir, I did.

Q What did you do when you got there?

A I stood up on the corner by Madison and 117th while the informant went to get Mr. Minor.

Q I see. So the informant went to get Mr. Minor, is that correct?

A Yes, sir.

Q And he came back with him?

A Yes, sir.

Q Do you know where he went?

A Into 57 117th.

[fol. 21] Q Is that where Mr. Minor was supposed to have been living at that time?

A To the best of my knowledge, yes, sir.

Q What happened after that?

A They came down and I came from the corner of 117th and Madison to the middle of the block, more or less, as an approximation the middle of the block, across the street from 57. That would be on the south side of 117th.

Q So that you were not with the informant when he went to pick up Mr. Minor, is that correct?

A Correct.

Q So you don't know what he said to him, is that correct?

A That's correct.

Q This transaction on January 9, 1967, how long did it take?

A Approximately four, five minutes.

Q Did it take place out in the street?

A Yes, sir, it did.

Q By the way, had you seen Mr. Minor prior to January 9, 1967?

A No, sir, I hadn't.

Q You say the second transaction took place on April [fol. 22] 8, 1967, is that correct?

A Yes, sir.

Q On that evening did the informant also go to see Mr. Minor before Mr. Minor met you?

A That transaction took place in the afternoon?

Q Yes.

A I don't know, because Agent Wilcocki was handling the arrangement. I was just available. Agent Wilcocki would call me up and say, "I have a buy; and go do it." So I don't know what arrangements were made.

Q At any rate, you arrived at the vicinity of 117th Street and Madison Avenue, is that correct?

A That afternoon, yes, sir.

Q What time was that?

A About 3:45 when we got to 117th Street, roughly.

Q When you saw Mr. Minor, who was in his company?

A I came to 117th Street with the informant and I sent him up to get Mr. Minor and they both came down a few moments later.

Q That was on April 8, 1967?

A Yes, sir.

Q And you don't know what the informant said to Mr. Minor on that day?

A No, sir, I don't.

[fol. 23] Q The transaction that was supposed to have occurred on April 8, 1967, where did that occur?

A In my personal automobile.

Q What kind of an automobile was it?

A A 1963 Valiant, beige in color, four door.

Q Did Mr. Minor sit in front of the car or did he come into the car at all?

A Yes, sir.

Q Did he come into the front or into the rear?

A He sat in the front next to me. I was driving.

Q How long did that transaction take?

A Approximately ten minutes.

Q In between January 24, 1967, and April 8, 1967, did you have occasion to see Mr. Minor?

MR. LUTTINGER: I am sorry, I didn't get the dates.

MR. PANZER: January 24, 1967, he—

THE COURT: You don't mean January 24th, you mean the first indictment, is that it?

MR. PANZER: I believe there was mention in his direct testimony—

THE COURT: I am sorry, you do mean that subsequent date.

[fol. 24] A Between January 24th and April 8th, no, sir, I didn't.

Q When was the next time you saw the defendant after April 8, 1967?

A It was during the end of April some time. I am not specific on a date. I don't remember it. I think it was near the end of April.

Q Was he in custody at that time?

A No, sir.

Q Now, sir, this informant, how long was he working for the Federal Bureau of Narcotics?

A I don't know, sir. He is not my informant. I am really not qualified to answer.

Q Did you discuss anything with him?

A Who?

Q Did you discuss the case with him before you came to court today?

A Did I discuss the case with the informant?

Q Yes.

A We went over it, yes, sir.

Q You are pretty familiar with his background, aren't you?

A No, sir, he is not my informant.

Q Let me ask you this: at the second transaction you [fol. 25] say you gave Mr. Minor \$450, is that correct?

A Yes, sir.

Q Did he give any part of that money to the special employee?

A No. Not to my knowledge, no, sir. If he did, it wasn't in front of me is what I mean.

Q The special employee left with you that day, didn't he?

A Yes, he did.

Q So if he did give him some money you would see it, is that correct?

A Yes, sir.

Q Was the special employee paid any funds?

A I don't know, sir. It is not my special employee so I don't know what arrangements were made with him. I was just the buying agent.

Q Whose special employee is he?

A Agent Wilkocki's. He would be better qualified to answer those questions than I would.

Q I didn't ask you if he was better qualified, I just asked you whether you knew?

A No, sir, I don't know.

MR. PANZER: I have no further questions, thank you.

[fol. 26] MR. LUTTINGER: Just one.

REDIRECT EXAMINATION

BY MR. LUTTINGER:

Q Mr. Panzer asked you whether or not you were aware that the informant had a narcotics conviction, and you answered yes, is that correct?

A Yes, I did.

Q Do you know when that conviction was?

A No, sir, I don't know.

MR. LUTTINGER: I have no further questions.

THE COURT: The witness is excused.

Please call the next witness.

(Witness excused)

* * * *

[fol. 48] FRANCISCO H. GUZMAN, recalled.

DIRECT EXAMINATION

BY MR. LUTTINGER:

Q Mr. Guzman, just one or two questions. On the evening of January 9, 1967, when you testified that you met Mr. Minor, at any time during the course of that evening did you exhibit to Mr. Minor any order for the purchase of heroin on that occasion?

A No, sir, I did not.

Q In any form other than your oral request for it?

A I exhibited no order.

Q Again with respect to April 8, 1967, did you at that time exhibit any order of any kind other than your oral order?

A No, sir.

Q For heroin.

A No, sir, I did not.

MR. LUTTINGER: I have no further questions.

THE COURT: There was no form issued in blank for the sale of the material you received that night issued by the Secretary of the Treasury of the United States?

THE WITNESS: Not to my knowledge, sir.

THE COURT: You may cross.

MR. PANZER: I have no cross.

MR. LUTTINGER: I have one further request before I close my case, your Honor. I would offer into evidence the Government's Exhibits 3 and 6 for identification.

MR. PANZER: No objection.

(Government Exhibits 3, 6 and 6-A received in evidence.)

THE COURT: Does that conclude the government's case?

MR. LUTTINGER: Yes, your Honor, and the government rests.

MR. PANZER: Your Honor, at this time my motion would be for a judgment of acquittal as a matter of law.

THE COURT: The motion is denied.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 67 Cr. 770

[File Endorsement (Omitted in Printing)]

UNITED STATES OF AMERICA

v.

JAMES MINOR

JUDGMENT AND COMMITMENT—January 9, 1967

On this 9th day of November, 1967 came the attorney for the government and the defendant appeared in person and¹ by counsel

IT IS ADJUDGED that the defendant upon his plea of² Not Guilty and a finding of Guilty by the Court, the defendant having waived trial by jury, has been convicted of the offense of unlawfully, wilfully and knowingly selling, bartering, exchanging and giving away heroin not in pursuance of written orders on forms issued in blank for that purpose by the Secretary of the Treasury of the United States or his delegate (Title 26, Sections 4705(a) and 7237(b), U.S. Code) as charged³ in 2 Counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ FIVE (5) YEARS on each of Counts 1 and 2 to run concurrently with each other.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United

States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward Weinfeld
United States District Judge

/s/ John J. Olear, Jr.
Clerk

Forma Pauperis Leave granted to file notice of appeal without payment of the statutory fee.

/s/ Edward Weinfeld
U.S.D.J.
Nov. 9, 1967

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Action Number 67 Cr. 770

[File Endorsement (Omitted in Printing)]

UNITED STATES OF AMERICA

vs.

JAMES MINOR

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT—Filed November 9, 1967

Notice is hereby given that DEFENDANT above named, hereby appeals to the United States Court of Appeals

for the Second Circuit from the * SENTENCE IM-
POSED NOV. 9, 1967.

Signed Anthony F. Marra

by /s/ Edward Panzer
Attorney for James Minor
Address
Room 9 U. S. Court House
Foley Sq. 7, N. Y. C.

Notice to: SEE REVERSE SIDE

* Insert whether order or final judgment:
or part thereof appealed from.

cc: MR. JAMES MINOR
Federal Detention Headquarters
427 West Street
New York, New York 10014

W. W. FITZPATRICK, Warden
Federal Detention Headquarters
427 West Street
New York, New York 10014

ROBERT M. MORGENTHAU
United States Attorney
Southern District of New York
U. S. Courthouse, Foley Square, New York
New York, New York 10007

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 527—September Term, 1967.

(Argued June 11, 1968 Decided July 3, 1968.)
Docket No. 31953

UNITED STATES OF AMERICA, APPELLEE

—v.—

JAMES MINOR, APPELLANT

Before: FRIENDLY, SMITH and KAUFMAN, *Circuit Judges*.

Appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York, Weinfeld, J., for selling narcotic drugs not in pursuance of a written order form in violation of 26 U. S. C. § 4705(a).

Affirmed.

JOHN S. ALLEE, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney, Pierre N. Leval, Assistant United States Attorney, of counsel), *for appellee*.

PHYLIS SKLOOT BAMBERGER, Legal Aid Society, New York, N. Y. (Anthony F. Marra, of counsel), *for appellant*.

KAUFMAN, *Circuit Judge*:

The sole question presented is whether the Fifth Amendment privilege against self-incrimination affords a defense to a prosecution for selling narcotic drugs with-

out the mandatory written order form required by 26 U. S. C. § 4705(a).¹

Following a trial before Judge Weinfeld without a jury, appellant James Minor was found guilty on two counts of selling heroin hydrochloride without the prescribed Treasury Department written order form. He was sentenced to the statutory minimum of five years' imprisonment on each count, the sentences to run concurrently. On this appeal, Minor does not allege the commission of any error by the Judge at the trial and concedes that we must affirm if we conclude that requiring compliance with § 4705(a) does not contravene the privilege against self-incrimination. Thus, for our purposes it is sufficient to note that Minor's one-day trial was not atypical of the usual humdrum narcotics prosecution. The government's case was presented through the testimony of federal agents and the defendant introduced evidence purporting to show that he was entrapped. Any conflicts or discrepancies in the testimony were obviously for the fact-finder to resolve, *United States ex rel. Anderson v. Fay*, — F. 2d — (2d Cir. 1968) (*per curiam*). Accordingly, we turn at once to consideration of Minor's Fifth Amendment claim.²

The problem before us has its genesis in a trilogy of recent decisions in which the Supreme Court reemphasized the importance of the privilege against self-incrimination in our adversary system of criminal justice and extended its reach to those "inherently suspect of criminal activities," *Albertson v. S. A. C. B.*, 382 U. S. 70,

¹ Section 4705(a) provides that:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate." (Emphasis supplied.)

² Although Minor did not claim a violation of his Fifth Amendment rights before Judge Weinfeld, the government does not contend that this failure presents a bar to reversal of his conviction. See *Grosso v. United States*, 390 U.S. 62, 70-72 (1968); *United States v. Manfredonia*, — F.2d — (2d Cir. 1968).

79 (1965), who are required by certain statutes to register with the Secretary of the Treasury or to pay special taxes. In *Marchetti v. United States*, 390 U. S. 39 (1968), the Court reversed a conviction under the federal wagering tax statutes for evading payment of the annual occupational tax, 26 U. S. C. § 4411, and for wilfully failing to register with the Treasury, 26 U. S. C. § 4412; in *Grosso v. United States*, 390 U. S. 62 (1968) a conviction for violating § 4411 and for failing to pay the special excise tax imposed on wagering, 26 U. S. C. § 4401, was set aside; in *Haynes v. United States*, 390 U. S. 85 (1968), the same fate befell a conviction for knowingly possessing a firearm, 26 U. S. C. § 5851, which had not been registered as required by 26 U. S. C. § 5841. In all three instances, Mr. Justice Harlan, speaking for the Court, reasoned that the petitioner was confronted by a comprehensive statutory scheme directed against a proscribed activity and was required, on pain of prosecution, to provide the government with information that might be used to convict him of a crime.

Minor claims here that the prohibition against the transfer of narcotics except in pursuance of a written order form is comparable to the provisions before the Supreme Court in *Marchetti*, *Grosso* and *Haynes* and that consequently his conviction must fall. Although § 4705(a) has been enforced against thousands of violators since its enactment in 1914, 38 Stat. 786, including cases which reached the Supreme Court, e.g., *Gore v. United States*, 357 U. S. 386 (1958), we recognize that the Court's recent pronouncements require a fundamental reevaluation of the statute.³ Our examination of the statutory scheme convinces us, however, that *Marchetti* and its companion cases are not dispositive of this appeal and that there is no conflict between enforcement of § 4705(a) and the purpose, philosophy and spirit of the privilege against self-incrimination.

³ The Supreme Court recently granted certiorari in *Leary v. United States*, — U.S. — (April 27, 1968), in which one of the issues presented is the validity of the marijuana tax and registration provisions in light of the privilege against self-incrimination. 36 U.S. L. W. 3466.

Considered *in vacuo*, compliance with § 4705(a) does not present any threat of self-incrimination. It simply provides that no sale may be made except to one who furnishes an appropriate Treasury Department written order form. The statutory language makes manifest—and Minor concedes—that the purchaser of narcotics and not the seller is under compulsion to apply for and obtain the requisite order form.⁴ Even if we were to assume *arguendo* that the registration and tax provisions infringe upon the purchaser's Fifth Amendment rights because order forms are available only to prospective purchasers who have registered under 26 U. S. C. § 4722 and paid the special tax imposed by 26 U. S. C. § 4721,⁵ see 26 U. S. C. § 4705(f), it hardly follows that a *seller*, such as Minor, is immune from prosecution for selling to a person who failed to provide the form. We need cite no authority for the principle that the privilege afforded by the Fifth Amendment is personal and that under the circumstances present here a seller cannot benefit from the privilege allegedly available to the buyer. Whatever views Minor may have had concerning passing of possession of heroin, it is clear that standing under the Fifth Amendment is not freely negotiable nor transferable.

Minor maintains, however, that § 4705(a) must be examined in the context of the entire statutory and regulatory scheme and that when so viewed the potential for incrimination becomes apparent. Specifically, he argues that 26 C. F. R. § 151.185 requires the seller to enter on the form supplied by the buyer the number and size of the stamped packages of drugs furnished and the date that each order was filled. In addition, both the seller and the buyer must preserve a copy of the form for 2

⁴ See note 1, *supra*.

⁵ Section 4722 provides, in relevant part, that "every person who engages in any of the activities enumerated in section 4721 shall register with the Secretary or his delegate his name or style, place of business . . ."

Section 4721 provides, in relevant part, that "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away narcotic drugs shall pay the special taxes hereinafter provided."

years and keep it readily accessible to inspection by appropriate government officials, 26 U. S. C. §§ 4705(d) and (e);⁶ and a third copy of the form must be forwarded by the seller to the narcotic district supervisor of the district in which the seller is located, 26 C. F. R. § 151.201. Minor urges, therefore, that the information he was required to furnish and make available to the government "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" under a number of statutes. See *Marchetti v. United States*, *supra*, 390 U. S. at 48. In sum, it is Minor's claim that his answers on the form would tend to prove that he supplied narcotic drugs outside the original stamped package (outlawed by 26 U. S. C. § 4704), and presumably that it follows that he failed to register with the Treasury Department as required by 26 U. S. C. § 4722, and that he possessed narcotic drugs in violation of 26 U. S. C. § 4724(c).⁷

The government retorts: "It is sufficient answer that appellant was [indicted under section 4705(a) and was] not charged with violation of these other provisions." In effect, we are asked to focus solely on § 4705(a), ignore the balance of the statutory scheme and the regulations, and leave the resolution of possible self-incrimination claims under those provisions to another day. But, the Supreme Court has informed us that we must give appropriate consideration in our analysis to closely related statutory requirements in determining whether there exists a "real and appreciable," *Reg. v. Boyes*, 1 B & S 311, 330; *Brown v. Walker*, 161 U. S. 591, 599-600 (1896), hazard of incrimination:

⁶ As originally enacted in 1914, these provisions were contained in the same paragraph as present section 4705(a). See 38 Stat. 787.

⁷ Section 4704 provides, in relevant part, that "it shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package."

Section 4724(c) provides, in relevant part, that "it shall be unlawful for any person who has not registered and paid the special tax . . . to have in his possession or under his control narcotic drugs."

"We must conclude that here, as in *Albertson* [v. S. A. C. B., *supra*], the validity under the Constitution of prosecutions for wilful failure to pay the excise tax may properly be determined only after assessment of the hazards of incrimination which would result from 'literal and full compliance' with all statutory requirements." *Grosso v. United States, supra*, 390 U. S. at 65.

Nevertheless, we are of the view that the issue we are called upon to resolve is significantly different from those before the Supreme Court in *Marchetti, Grosso* and *Haynes* and we conclude that Minor's conviction must be affirmed because compliance with § 4705(a) would not have subjected him to the risk of self-incrimination. If § 4705(a) serves a distinct Congressional purpose and can be meaningfully enforced apart from the sections which allegedly pose the incrimination dilemma, it is incumbent upon us to consider it as an isolated enactment in order to avoid the adjudication of a serious constitutional issue. See, e.g., *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (concurring opinion of Mr. Justice Brandeis), cited in *Haynes v. United States, supra*, 390 U. S. at 92. Moreover, Congress has specifically provided that:

"If any provision of this title [title 26], or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application to other persons or circumstances, shall not be affected thereby." 26 U. S. C. § 7852(a).

And, we believe that § 4705(a) serves an important function within the statutory scheme even if, which we do not decide, the seller cannot be forced to fill out the form and to keep it available for government inspection. Requiring that sales be made only to persons who have acquired and are able to produce Treasury forms ensures that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes imposed under 26 U. S. C. §§ 4701 and 4721. See *Nigro v. United States*, 276 U. S. 332,

346-47 (1928). Compare *United States v. Hymowitz*, 196 F. 2d 819, 821 (2d Cir. 1952) (discussing what is now subdivision (g) of section 4705). The Court's statement in *Nigro* is quite relevant:

"Congress intended not only to punish sales without registration . . . but also to punish them without order forms from the purchaser to the seller, as a means of making it difficult for the unregistered seller to carry through his unlawful sales to those who could not get order forms." 276 U. S. at 350.

Although the Court in that case focused upon potential sales by unregistered sellers, its analysis is equally apposite to sales by those legally in possession of narcotics. In both situations, § 4705(a) ensures that narcotics do not fall into the hands of those who, for one reason or another, cannot satisfy the registration requirements of § 4722. And, a seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who are duly authorized to deal in narcotic drugs. Thus, we conclude as the Court did in *Nigro* that: "To punish him [the seller] for this misuse [or, in the instant case, lack of use] of the order form is not to punish him for not recording his own crime." 276 U. S. at 350-51.

We recognize, of course, that in *Marchetti*, *Grosso* and *Haynes* the Supreme Court refused to sever one statutory provision from another in considering whether the statutory scheme presented a danger of incrimination, but the valid reasons that justified those results are absent here. In *Marchetti* the Court decided that the obligations under the wagering tax statutes to register and pay the occupational tax are "essentially inseparable elements of a single registration procedure" because under settled Treasury practice a payment of the tax would not be accepted unless accompanied by a completed registration form. See 390 U. S. at 42-43. Similarly, in *Grosso* the Court refused to distinguish between the obligation to pay the gambling excise tax and to file the requisite tax return, although the two were separately punishable, be-

cause of government policy to refuse the payment unless submitted with a return. 390 U. S. at 65. In the instant case, as we have already noted, a seller of narcotic drugs is not required to register or in any other way to incriminate himself in order to comply fully with the requirements of § 4705(a). And the discussion of severability in *Haynes* was manifestly concerned with an entirely different problem since the Court merely reasoned that a conviction under the registration clause of 26 U. S. C. § 5851 could not be properly distinguished from a conviction for failure to register firearms as required by 26 U. S. C. § 5841. Since § 5851 specifically rendered illegal the possession of firearms which have not been "registered as required by section 5841" no other conclusion was possible.

In sum, we hold that compliance with § 4705(a) would not have required Minor to risk incriminating himself. Whether any other section of the Internal Revenue Code dealing with trade in narcotics impinges upon the right against self-incrimination is a question we need not decide at this time.

There is a further persuasive distinction between the issue before us and those presented in *Marchetti* and its companion cases. In *Marchetti* and *Grosso* the Court placed great emphasis on the wide prohibition against gambling under both federal and state law, 390 U. S. at 44-48, and stressed that the gambling statutes were directed at a "selective group inherently suspect of criminal activities," 390 U. S. at 57.^{*} The firearms registration statutes before the Court in *Haynes* had the even more apparent purpose of gathering information from possible criminals in order to secure their conviction of various crimes. The Court noted:

^{*} This provided one ground upon which the Court distinguished the "required records" doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948). The Court also distinguished *Shapiro* on other grounds, but did not believe it necessary to weigh the relative significance of the factors it found present in *Shapiro* but absent in *Marchetti*, *Grosso* and *Haynes*. See 390 U.S. at 57 (*Marchetti*); 390 U.S. at 68 (*Grosso*); 390 U.S. at 98-99 (*Haynes*).

"The registration requirement is thus directed principally at those persons who have obtained possession of a firearm without complying with the Act's other requirements and who are therefore immediately threatened by criminal prosecutions . . ." 390 U. S. at 96.

Section 4705(a), on the other hand, cannot be said to be directed primarily at those "inherently suspect of criminal activities." Our previous discussion of its purpose was intended to make it evident that it was one section of an important and significant statutory scheme regulating the conduct of a lawful business. While we are not unaware that many have been prosecuted for violating the narcotics provisions of the Internal Revenue Code, we cannot accept Minor's argument that the narcotic drug business consists entirely, or even in the main, of shadowy figures in the underworld passing small glassine bags in dark alleyways. On the contrary, we have been advised by the government that as of December 1966, there were 394,193 persons duly registered under the narcotics laws who were authorized to obtain written order forms from the government and engage legitimately in narcotic drug transactions, and of these only one person was prosecuted during 1966 for a violation. See *Traffic in Opium and Other Dangerous Drugs*, U. S. Treasury Department, Bureau of Narcotics (1966), at pp. 10 and 44. We have also been informed that in that year over 170,000 kilograms of opium and over 260,000 kilograms of coca leaves were imported legally into the United States while only approximately 100 kilograms of narcotic drugs were seized or purchased in the illicit market by federal agents. *Id.* at 43. It would not be factual to say of the narcotics statutes and regulations what the Supreme Court said of other more general tax provisions—that they are "directed at the public at large," see *United States v. Sullivan*, 274 U. S. 259 (1927); *Albertson v. S. A .C. B.*, *supra*, 382 U. S. at 79; it would be equally inaccurate, however, to say, that they are "directed at a highly selective group inherently suspect of criminal activities," *ibid.*

It is not our function to anticipate changes of doctrine and thus render ineffective a vital statutory scheme designed by the Congress to regulate the potentially dangerous traffic in narcotic drugs.

Affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of July one thousand nine hundred and sixty-eight.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES MINOR, DEFENDANT-APPELLANT

JUDGMENT—July 3, 1968

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

SUPREME COURT OF THE UNITED STATES

No. 766, Misc., October Term, 1968

JAMES MINOR, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS AND GRANTING PETITION
FOR WRIT OF CERTIORARI—June 2, 1969

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1473 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.